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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 792

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - Appellant,

versus

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
RAILWAY LABOR EXECUTIVES' ASSOCIATION, and
ATLANTA EMPLOYEES PROTECTIVE ASSOCIATION, - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

JURISDICTIONAL STATEMENT.

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UNITED STATES OF AMERICA,
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RAILWAY LABOR EXECUTIVES' ASSOCIATION, and
ATLANTA EMPLOYEES PROTECTIVE ASSOCIATION, - - - - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

JURISDICTIONAL STATEMENT.

The Appellant, Louisville and Nashville Railroad Company (L&N), appeals from the judgment of the United States District Court for the Western District of Kentucky, entered on September 1, 1965 (R. 56),[1] dismissing Appellant's amended complaint seeking to

[1]The original judgment was entered August 9, 1965, but was set aside August 31, 1965, so that the District Court might make certain corrections in its opinion. Thereafter, the judgment of September 1, 1965, was entered.

set aside certain portions of a report on further hearing, and the order entered thereon, of the Interstate Commerce Commission in a proceeding styled *Louisville & N. R. Co. Merger,* Finance Docket No. 18845.

OPINIONS BELOW.

The corrected opinion of the District Court (R. 40-50, 53-55), is reported in 244 F. Supp. 337. The report on further hearing of the Interstate Commerce Commission is reported in 312 I.C.C. 676 (R. 9, Ex. F). The District Court's corrected opinion, its order of August 31, 1965 making certain changes in its original opinion (R. 53), its judgment of September 1, 1965, the Commission's report above referred to, and the Commission's order dated October 26, 1961 entered upon such report (R. 10, Ex. G), are reproduced in Appendix A hereof.

JURISDICTION.

This suit was brought under 28 U.S.C. § 1336 to set aside certain portions of a report and order of the Interstate Commerce Commission. The final judgment of the District Court was entered September 1, 1965 (R. 56), and notice of appeal was filed by the Appellant in that court on October 8, 1965 (R. 57-61). The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following cases

sustain this Court's jurisdiction: *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156 (1962); *American Trucking Associations, Inc.* v. *United States,* 364 U. S. 1 (1960).

QUESTIONS PRESENTED.

1. Where the Interstate Commerce Commission has recognized and found that an unincorporated terminal company is a separate entity, a separate common carrier, and an employer of its own employees, can it, without supporting evidence or findings, properly conclude that those employees are also the joint or common employees of the carriers which created and control the terminal company?

2. Where a decision of the Interstate Commerce Commission depends upon the determination of questions of law, does the District Court discharge its obligation of judicial review by deferring to the expertise of the Commission?

3. Where certain persons have consistently held themselves out to be the sole and exclusive employees of a terminal company and accepted all of the benefits arising from that relationship, did the Interstate Commerce Commission act arbitrarily, capriciously and in abuse of its discretion in holding those persons to be the joint or common employees of the companies which formed and control the terminal company?

STATUTES INVOLVED.

Sections 1(3)(a) and 5(2) of the Interstate Commerce Act, as amended (49 U.S.C. §§ 1(3)(a) and 5(2)), are set forth in Appendix B hereof.

STATEMENT.

In January, 1955, the appellant herein, Louisville and Nashville Railroad Company, and The Nashville, Chattanooga & St. Louis Railway (NC&StL) jointly applied to the Interstate Commerce Commission for authority under Section 5(2) of the Interstate Commerce Act to merge the properties and franchises of the NC&StL into the L&N for ownership, management and operation (R. 7). Extensive hearings were held, the case was briefed, and in June, 1956, the Hearing Examiner issued his report recommending approval of the proposed merger. Exceptions and replies were filed, following which, in December, 1956, the case was orally argued before the entire Commission. It was at that oral argument that the train of events was set in motion which brings this case before this Court:

At the oral argument, counsel for the Railway Labor Executives' Association contended for the first time that the employee protective conditions which Section 5(2)(f) of the Interstate Commerce Act requires the Commission to impose in rail merger cases "should be made applicable to railroad employees of carriers other than those of the applicants herein, particularly as to the employees of the Atlant[a] Joint Terminals pres-

ently engaged in performing service in connection with the terminal operations of the applicants at Atlanta."[1]

By its report and order of March 1, 1957, the Commission approved the proposed merger. In the course of its report, the Commission recited what had been urged by counsel for the Railway Labor Executives' Association at the oral argument; and it went on to say that "[w]hile it is our intention that the Atlanta Joint Terminal employees are to be protected, we are not prepared to state, on the present record, tha[t] any diminution of employment at the Atlanta terminal would be directly attributable to the action of the applicants in consummating the merger herein authorized. : . ."[2]

The merger of the L&N and NC&StL was consummated in August, 1957 (R. 41).

Both the Atlanta Joint Terminals employees[3] and the L&N[4] asked the Commission for further consideration of the problem of the Atlanta Joint Terminals employees, but the Commission denied the requests. The L&N, in March, 1959, then filed its complaint in the District Court seeking to set aside the Commission's order insofar as it purported to extend to the AJT employees the benefit of the employee protective conditions imposed in the L&N-NC&St.L merger case (R. 41). Thereafter, on June 9, 1959, on its own motion, the

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[1]The quoted language is from *Louisville & N. R. Co. Merger,* 295 I.C.C. 457 (1957), at page 501. The Atlanta Joint Terminals are herein sometimes called AJT.

[2]295 I.C.C. 501, at page 502.

[3]By a petition for reconsideration filed in April, 1957 (R. 32).

[4]By a petition for reconsideration filed in August, 1958 (R. 29). The Commission's report (312 I.C.C. at 677, App. A, p. 19a) erroneously refers to it as a "petition for leave to intervene."

Commission reopened the proceeding for further hearing "to determine the nature and organizational character of Terminals, the relationship of it and its employees, if any, to the Louisville & Nashville, and the extent to which, if any, our report and order herein of March 1, 1957, should be modified insofar as the protective conditions prescribed therein were made applicable to the employees of Terminals."[1] The action in the District Court was then held in abeyance pending the Commission's further action (R. 41).

After the further hearing, briefs, and argument, the Commission, on October 26, 1961, issued its report and order in the reopened proceeding, *Louisville & N. R. Co. Merger,* 312 I.C.C. 676 (1961) (App. A, p. 18a). The Commission said that although it assumed that AJT is a common carrier as that term is defined in Section 1(3)(a) of the Act, this is not dispositive of the issue of the relationship of the AJT employees to the L&N; that even if AJT be considered a carrier for purposes of regulation under the Act, the Commission is not precluded from finding that there exists between AJT employees and L&N an employee-employer relationship; that the fact AJT has been treated as a carrier in the field of labor relations does not preclude such a finding; and that the employees of AJT must be regarded as being, in reality, the employees of the L&N and the other carriers which created the AJT (App. A, p. 30a).

Following denial by the Commission of L&N's request for reconsideration, the L&N in January, 1963, filed its amended complaint in the court below seeking

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[1]312 I.C.C. 676, at page 677 (App. A, p. 20a).

to set aside the Commission's report and order of October 26, 1961 (R. 6). After briefs and argument, the District Court handed down its opinion of August 5, 1965 (R. 40-50), in which it refused "to disturb the conclusions of this experienced agency of the Government charged with manifold duties in the field of transportation, no small part of which is in the area of mergers and affiliations in an effort to 'slow down and arrest the economic deterioration of the American railroads'" (R. 49, App. A, p. 11a).[1]

Judgment was entered dismissing the complaint (R. 56), and this appeal was taken therefrom (R. 57).

THE QUESTIONS ARE SUBSTANTIAL.

This case presents important questions concerning the administrative process, judicial review, and the interpretation of the Interstate Commerce Act. These questions have an importance going beyond the interests of the litigants in this case. Answers to them should be provided by this Court for the guidance of future litigants, the administrative agencies and the lower courts.

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[1]The District Court did not give the source of its quotation which begins with the word "slow."

1. **WHERE THE INTERSTATE COMMERCE COMMISSION HAS RECOGNIZED AND FOUND THAT AN UNINCORPORATED TERMINAL COMPANY IS A SEPARATE ENTITY, A SEPARATE COMMON CARRIER, AND AN EMPLOYER OF ITS OWN EMPLOYEES, CAN IT, WITHOUT SUPPORTING EVIDENCE OR FINDINGS, PROPERLY CONCLUDE THAT THOSE EMPLOYEES ARE ALSO THE JOINT OR COMMON EMPLOYEES OF THE CARRIERS WHICH CREATED AND CONTROL THE TERMINAL COMPANY?**

The central issue in this case is whether the employees of AJT are the employees of the L&N and thus may be entitled to the benefit of the protective conditions which the Commission imposed in the L&N-NC&StL Merger case. The Commission ordered a hearing to determine (1) the nature of the AJT, (2) its organizational character, and (3) the relationship of the AJT and its employees to the L&N. It further sought to determine how its prior report and order should be modified insofar as the protective conditions are concerned.

At the hearing the appellant established that the AJT is an unincorporated association, a carrier as defined in Section 1(3)(a) of the Interstate Commerce Act, and the employer of its own employees. The conclusion that the appellant sought to have the Commission draw from these premises was that the AJT and its employees are separate and distinct from the L&N and its employees.

The Commission although assuming that the AJT must be considered "a common carrier as that term is defined in Section 1(3)(a) of the Interstate Act;" "a carrier for purposes of regulation under the act," and "a carrier in the field of labor relations," said that the Commission was not precluded thereby "from finding

that there exists between Terminals' employees and the Louisville & Nashville an employee-employer relationship." The Commission concluded that AJT "is not a business organization independent of the railroads which created, operate, and control it as their joint agency," and that the AJT employees were the joint or common employees of the L&N and the other carriers which had formed the AJT (312 I.C.C. 683-684, App. A, p. 30a).

In the court below, the Commission and the United States, in Paragraph V of their answer (R. 15), admitted that the AJT is a separate and distinct common carrier and a separate and distinct unincorporated association but alleged that it has common or joint employees with the L&N. On brief, they asserted that "[w]hether Terminals (an unincorporated association) is a legal entity is quite irrelevant" (R. 38); that "we concede that Terminals is a carrier or other legal entity subject to the Act" (R. 37); and that "[j]ust as we concede that Terminals may be considered a 'carrier,' we also concede that it may be an employer" (R. 39). The Commission and the United States went on to argue that Section 5(2)(f) permits the determination in a proper case that the employees of one carrier are also the employees of another, and that although the AJT is an employer of its own employees, the Commission could conclude that "L. & N. is also an employer of these same workers" (R. 39).

It will at once be seen that the Commission was quite uncertain as to the basis upon which it rested its conclusion that AJT employees are L&N employees.

In one breath, it was saying that the AJT is not a business organization independent of the railroads which created it. In the next it was conceding (quite correctly) that AJT was a distinct entity, carrier, and employer and concluding (erroneously) that AJT employees were nevertheless L&N employees. The uncertainty of its premises is alone sufficient reason for declaring the order invalid. The Commission itself has said:

> "In coming before us for authorization, Allegheny must be understood to have decided that it is either a carrier . . . or a person which is not a carrier. . . . These conditions of status are exclusive of each other and cannot simultaneously characterize an individual or an entity." *Louisville & J. B. & R. Co. Merger,* 290 I.C.C. 725, 734 (1955).

In *Nashua Motor Express, Inc.* v. *United States,* D. C. New Hampshire, 230 F. Supp. 646 (1964), an order of the Commission which was rested on alternative bases was set aside, the Court saying (p. 652):

> "From this, we must conclude at best that it is not at all clear what the Commission has purported to find, or, at worst, that the finding embodied in the second horn of the dilemma is wholly arbitrary."

The Commission's contradictory statements are reflections of the only two possible theories—and they are conflicting—under which it could be contended that the L&N is the employer of those who are the employees of the AJT: The first is that the L&N is the

employer because it is one of the three carriers which established the unincorporated association known as the AJT. Under this theory, the unincorporated association is treated as if it did not exist. The second is that the L&N as a carrier and the AJT as a carrier have jointly employed the AJT workers. The first theory is contrary to the Interstate Commerce Act and the expressions of this Court. The second is without validity in this case because there is neither evidence nor findings to support it.

As for the first theory, the Congress has declared that, whatever may have been the common-law rule, for the purpose of administering the pertinent provisions of the Interstate Commerce Act an association shall be regarded as an entity. In Section 1(3)(a) it has declared that the word "carrier" is synonymous with "common carrier" and has defined the latter term to mean "all persons, natural or artificial," engaged in transportation as defined by Section 1(1) of the Act. It has then defined the term "person" as follows:

> "The term 'person' as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; . . ."

Under this definition an unincorporated association engaged in common-carrier service is to be regarded as an entity and not as the mere aggregate of its creators.

The definition of "person" as given in Section 1(3)(a) was taken from Section 203(a)(1) of the

Motor Carrier Act, 49 U.S.C. §303(a), and in *United States* v. *A.&P. Trucking Co.*, 358 U. S. 121 (1958), this Court held that Congress had in that section changed the common-law rule and had declared that partnerships were to be treated as entities. If partnerships are to be so treated, so too are associations, for they are both included in the same statutory definition of "person."

In reaching its conclusions regarding the status of the AJT, the Commission completely disregarded the definitions provided by the Congress and merely applied the common-law concept of an unincorporated association. This was error.

The Commission's action also runs counter to Section 5(2), for the term "carrier" as used therein means "carrier" as defined in Section 1. If the AJT is a carrier "for purposes of regulation," as the Commission has correctly said, it is a carrier under Section 5(2)—a carrier separate and distinct from the L&N. The entire proceeding before the Commission was concerned with the regulation of carriers, and the power of the Commission to impose employment protective conditions under Section 5(2)(f) depends directly upon its power to regulate carriers.

Thus, since the AJT is a separate carrier for purposes of regulation, the Commission should have held that the AJT employees were not entitled to the benefits of the protective conditions imposed in the L&N-NC&StL Merger case; for the Commission had disavowed (312 I.C.C. 684, App. A, p. 30a) any intention of protecting the AJT employees if they are not L&N

employees. The propriety of the Commission's action must be judged solely on the grounds invoked by the Commission, *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80 (1943) and 332 U. S. 194 (1947).

This Court should correct the erroneous result: Cf. *Norton* v. *Warner Co.*, 321 U.S. 565 (1944) at page 569:

> "If the award were to stand, there would be brought within the Act a group of workers whom we do not believe Congress intended to include."

The other possible theory, that the L&N as a carrier and the AJT as a carrier jointly employed the AJT workers, is not supported by either evidence or findings. It therefore cannot pass the tests of legality set by Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009. There is no suggestion anywhere in the record that the L&N and the AJT jointly employed the AJT employees. On the contrary, there was evidence that when the AJT employees went on the L&N property to do some emergency work, they regarded the L&N as a "foreign line" and claimed premium pay for the work. The AJT, as a terminal company, handled L&N business no differently from the way in which it handled the business of the other lines using its facilities. The following rulings are applicable here:

> "The agency must make findings that support its decision, and those findings must be supported by substantial evidence." *Burlington Truck Lines, Inc.* v. *U. S.*, 371 U. S. 156, 168 (1962).

"Findings supported by substantial evidence are required." *I.C.C.* v. *J-T Transport Co.*, 368 U. S. 81, 93 (1961).

"A finding without evidence is arbitrary and baseless." *I.C.C.* v. *Louisville & N. R. Co.*, 227 U.S. 88, 91 (1913).

The facts of the present case differ from those in *Railway Labor Executives' Association* v. *United States*, D. C. Va., 216 F. Supp. 101 (1963), cited by the court below (R. 47; App. A, p. 8a). In that case the two carriers using the passenger station there involved were held to have jointly employed the station employees which, for convenience, were carried on the payroll of one of the carriers. The passenger station was not a separately operated common carrier. But here, the carriers which were to use the AJT facilities set up a separate unincorporated organization to operate the terminals; that organization is conceded by the Commission and the United States to be a carrier in its own right; and that carrier employed its own employees who did all of the work of the terminals, whether that work involved the handling of L&N business or the business of some other carrier. If the AJT as a separate carrier is to be ignored, every terminal company in the country may find that it, too, is to be ignored and that its employees are the employees of the trunk lines which use its facilities. Such a result would be most unsettling to existing employer-employee relations.

2. WHERE A DECISION OF THE INTERSTATE COMMERCE COMMISSION DEPENDS UPON THE DETERMINATION OF QUESTIONS OF LAW, DOES THE DISTRICT COURT DISCHARGE ITS OBLIGATION OF JUDICIAL REVIEW BY DEFERRING TO THE EXPERTISE OF THE COMMISSION?

The opinion of the court below is devoted primarily to a recitation of the contentions of the parties, followed by a single paragraph in which the court resolved all questions by deferring to the expertise of the Commission. The court accepted the Commission's view that the existence of the employer-employee relationship is purely a question of fact. It did not resolve the problem presented by the Commission's treating the AJT as being a carrier for purposes of regulation and then treating it as if it did not exist at all. It did not examine into whether there was evidence or findings to support a determination that the employees of one carrier are also the employees of another. All of these questions were avoided by bowing to the Commission's expertise. This was error.

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. §1009(e), provides in part:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."

This case did not present a question addressed to the discretion of the Commission, such as, for example, whether a certificate or permit shall be issued. The

fundamental issue was one of law, to be passed upon by the courts. The District Court was clearly wrong in deferring, in this case, to the Commission's "wisdom and experience."

This Court has held that the question of the existence of the employment relation is one of law:

> "The administrative decision thus turned upon a question of law, whether a field deputy marshal during the period from December 16, 1895 to December 30, 1902, was an employee of the United States. The administrative determination of that question is open to review in the present suit, and should have been considered and decided by the court below." *Dismuke* v. *United States,* 297 U. S. 167, 173 (1936).

Whether the question here be regarded as one of law within the meaning of the *Dismuke* case, or one of law because of a misconstruction of the Interstate Commerce Act (*Norton* v. *Warner Co.,* 321 U. S. 565, 569 (1944)), or one of law as to the adequacy of findings and supporting evidence, the duty of the District Court was the same: To make its own evaluation of the correctness of the conclusions of the Commission. This the District Court failed to do, and its error should be corrected.

> "Reviewing courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Not only is such review always properly within the judicial

province, but courts would abdicate their responsibility if they did not fully review such administrative decisions.

. . . . .

"Since the order therefore rested on 'an erroneous legal foundation,' the Court of Appeals properly refused to enforce it." *NLRB* v. *Brown,* 380 U. S. 278, 13 L. Ed. 839, 849 (1965).

"The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Bldg. Co.* v. *NLRB,* 380 U. S. 300, 13 L. Ed. 855, 867 (1965).

"Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 490 (1951).

Even in cases involving agency discretion, the requirements of the Administrative Procedure Act relating to procedure and findings must be observed.

"Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 167 (1962).

3. WHERE CERTAIN PERSONS HAVE CONSISTENTLY HELD THEMSELVES OUT TO BE THE SOLE AND EXCLUSIVE EMPLOYEES OF A TERMINAL COMPANY AND ACCEPTED ALL OF THE BENEFITS ARISING FROM THAT RELATIONSHIP, DID THE INTERSTATE COMMERCE COMMISSION ACT ARBITRARILY, CAPRICIOUSLY AND IN ABUSE OF ITS DISCRETION IN HOLDING THOSE PERSONS TO BE THE JOINT OR COMMON EMPLOYEES OF THE COMPANIES WHICH FORMED AND CONTROL THE TERMINAL COMPANY?

Under Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e), a court which is reviewing agency action is required to hold unlawful and set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In view of the overwhelming evidence of the separateness of the AJT and its employees from the L&N, the Commission's conclusion that the AJT employees are L&N employees is arbitrary, capricious and an abuse of the Commission's discretion—indeed, the Commission had no discretion in the matter.

It was shown without contradiction that for fifty years the AJT employees have held themselves out to be the sole employees of the AJT and not employees of the L&N; that they have had their own collective bargaining representatives, who negotiated their own collective bargaining agreements with the AJT; that, through mediation, they forced the AJT to become a party to the Washington Job Protection Agreement[1] a year before the L&N was persuaded by its employees to become a party; that they sought and obtained benefits under the agreement last mentioned as sole em-

[1]This Agreement is discussed in *Railway Labor Executives' Assn.* v. *United States,* 339 U. S. 142, 147 (1950).

ployees of the AJT and alleged that the AJT was a party thereto and that the L&N was not; that they secured a union-shop agreement with the AJT at a time when there was no such agreement on the L&N; that as sole employees of the AJT they used the services of the National Mediation Board and the National Railroad Adjustment Board to settle their differences with the AJT; and that they demanded and received penalty pay when, in emergencies, they were asked to work on the L&N, the AJT employees asserting that the L&N was a "foreign line," meaning a line by which they were not employed (App. 7a-8a, 25a-26a).

Findings without support in the evidence and findings which are contrary to the evidence cannot stand. It is the duty of the courts to strike them down.

> "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority." *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 277 (1933).

> "An order based upon a finding made without evidence, *The Chicago Junction Case,* 264 U. S. 258, 263, or upon a finding made upon evidence which clearly does not support it, *Interstate Commerce Commission* v. *Union Pacific R. R.,* 222 U. S. 541, 547, is an arbitrary act against which courts afford relief." *Northern Pac. Ry. Co.* v. *Dept. of Public Works,* 268 U. S. 39, 44-45 (1925).

"In cases arising under the Interstate Commerce Act, the provisions of which contemplate an investigation or inquiry conducted with some formality, followed by a written report and decision as the basis of the orders, it has been repeatedly held by this court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary, and therefore subject to be set aside." *Louisville & N. R. Co.* v. *Finn,* 235 U. S. 601, 606 (1915).

CONCLUSION.

It would be easy enough for this Court to dispose of this case by summary affirmance; but if it were to do so it would join the Court below and the Commission in denying the Appellant a basic right: The right to a disposition of its case which follows the correct rules of law, which clearly states the reasons for the rulings, and which is supported by proper findings based on substantial evidence. Cf. Black, J., dissenting, *Chicago & E. I. R. Co.* v. *United States,* 375 U. S. 150 (1963).

The Commission's report was contradictory and unclear, and the confusion as to the basis for the Commission's ruling was increased by the new theories of justification for it which were advanced by the Commission and the United States in pleadings and brief below. The concessions made by the Commission and the United States required a judgment in appellant's favor.

The Commission's errors might have been righted had the Court below given the Appellant the judicial

review to which it was entitled. But it didn't. It refused to grapple with the substantial legal questions presented. It abdicated its responsibility in the mistaken belief that this was a case within the expertise of the Commission and that what the Commission had decided was binding on it. This was not judicial review; it was the judicial rubber-stamping of approval on Commission action.

"[T]he appellant has a grievance, and one that is substantial and not merely colorable or fanciful. Somewhere must reside judicial power to adjudicate it, and grant him . . . adequate relief" (*Teague* v. *Brotherhood,* C.A. 6, 127 F. 2d 53, 56 (1942)). This Court was that "somewhere": *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192 (1944). It is that "somewhere" in the case at bar.

Probable jurisdiction should be noted and the case set down for argument on the merits.

Respectfully submitted,

H. G. Breetz,

W. L. Grubbs,

Eugene W. Herde,

M. D. Jones,

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Attorneys for Appellant.

*Counsel of record on whom service should be made.

December 2, 1965

APPENDIX A

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES of America and Interstate Commerce Commission, Defendants,

and

Railway Labor Executives' Association and Atlanta Employees Protective Association, Intervening Defendants.

Civ. A. No. 3761.

United States District Court
W. D. Kentucky,
at Louisville.
Aug. 5, 1965.

* * * * * * *

Before MILLER, Circuit Judge, BROOKS, District Judge, and ROY M. SHELBOURNE, Senior District Judge.

SHELBOURNE, Senior District Judge.

The Louisville and Nashville Railroad Company (L & N) filed this action seeking to annul and set aside certain portions of the reports and orders of the Interstate Commerce Commission (Commission) in a proceeding styled Louisville & Nashville Railroad Company, et al., Merger, Etc., Finance Docket No. 18,845. In that proceeding the Commission approved the merger of the property and franchises of the Nashville, Chattanooga & St. Louis Railway

(NC & StL) into L & N ownership, management and operation as provided by Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2). The part of the Commission's report and orders which the L & N attacks relates to extension of employee protective benefits under Section 5(2)(f) of the Act to the railroad employees engaged in the operation of the Atlanta Joint Terminals (AJT).

The controversy here stems from the Commission's report and order of March 1, 1957, in which the Commission indicated that the protective benefits provided for the adversely affected employees of the L & N and NC & StL would likewise extend to and cover employees of AJT, if, in fact, they were adversely affected as a result of the merger. 295 I.C.C. 457, 502.

April 8, 1957, the Atlanta Employees Protective Association, representing AJT's employees, filed with the Commission a petition for leave to intervene and sought a reconsideration of the Commission's order on the ground that the order did not adequately protect the employees of AJT. By its order dated July 10, 1957, the Commission granted the petition for leave to intervene but denied reconsideration of its previous order. The merger of the NC & StL into the L & N was effected August 31, 1957. The L & N petitioned the Commission with respect to the relief afforded the AJT employees on August 15, 1958, and its petition was rejected.

The Commission reopened the proceeding on its own motion on June 9, 1959, for the sole purpose of determining the nature and organizational character of AJT and the relationship of its employees with those of the L & N. By its report and order of October 26, 1961, following a hearing, the Commission determined on the facts before it that the employees of AJT must be regarded as being joint and common employees of the L & N and affiliated carriers,

which created shared responsibilities and expense in AJT's operation. It ordered that the AJT employees were entitled to protection under Section 5(2)(f) of the Act if their employment was adversely affected by the merger. 312 I.C.C. 676.

The complaint in this action was filed by the L & N on March 6, 1959, challenging the validity of the Commission's order of March 1, 1957, granting the protective benefits of Section 5(2)(f) to the AJT employees. The Railway Labor Executives' Association and the Atlanta Employees Protective Association were permitted to intervene as defendants on April 6, 1959. After the Commission reopened the proceedings before it, this Court suspended further action on L & N's complaint on June 30, 1959. Subsequent to the termination of the reopened proceedings before the Commission, the Court sustained L & N's motion to file an amended complaint by its order of September 11, 1963. Answers were filed by the defendants and intervening defendants, extensive briefs were submitted, and the case was argued before this Court comprised of three judges November 13, 1964.

The L & N does not dispute the facts on which the Commission based its determination that the AJT employees were the joint employees of the L & N, the Georgia Railroad (Georgia), and the Atlanta & West Point Railroad Company (A & WP). The L & N's challenge is to the conclusion from the established facts drawn by the Commission, and it claims that the Commission's decision lacks a rational foundation in law because it fails to take cognizance of the significance and meaning of the facts. It is contended that the Commission's decision regards AJT as a separate entity, a carrier, and an employer in its own right and also as a mere aggregate of the three railroads which created it, and that such treatment of the facts is an obvious logical fallacy.

The Commission rejected the L & N's argument and in its report of October 26, 1961, the Commission said:

> "Assuming, as we do, that the nature of the services performed by Terminals requires that it be considered a common carrier as that term is defined in section 1(3)(a) of the Interstate Commerce Act, this is not dispositive of the issue of the relationship of the terminal employees to Louisville. In our opinion, even if Terminals should properly be considered a carrier for purposes of regulation under the Act, we are not precluded from finding that there exists between Terminals' employees and Louisville an employee-employer relationship. Nor does the fact that Terminals has been treated as a carrier in the field of labor relations preclude such a finding. While the factors relied on by Louisville have been considered along with all of the facts and circumstances embodied in the record before us, we do not regard them as controlling."

The L & N has advanced a second somewhat similar but distinct argument. In this line of attack, L & N charges that the Commission exceeded its authority by treating AJT as a mere aggregate and creature of three railroads when Section 1(3)(a) of the Act defines "common carrier" in such terms that AJT must be considered a carrier in its own right for purposes of the Act. It is argued that the Commission disregarded the definitions prescribed by Congress for proper administration of the Act when it stated in its report of October 26, 1961, supra, that AJT must be considered a common carrier as that term is defined in the Act but that it did not regard this as dispositive of the issue or controlling. L & N contends that the Commission cannot disregard the status conferred on AJT by the Act for the purposes of Section 5(2)(f) when for "purposes of regulation" within the framework of the

Act the Commission recognizes AJT as a carrier in its own right. It is claimed that the Commission's determination is not only an arbitrary exercise of its administrative function but is also beyond the Commission's statutory authority.

In reply to the arguments advanced by the L & N, the Commission contends that AJT's status as a legal entity, employer or carrier is irrelevant because the existence of an employee-employer relationship between the employees at AJT and the L & N is a question of fact. Walling v. Western Weighing & Inspection Bureau, 7 Cir., 160 F. 2d 47, 48 (1946). Since the issue is purely factual, the Commission maintains that the Act permits a determination in a proper case that the employees of one carrier are also the employees of another carrier for the purposes of Section 5(2)(f). Railway Labor Executives' Association v. United States, D.C., Va., 216 F. Supp. 101 (1963). The Commission asserts that this is a proper case for such a determination, as a finding that employees at AJT are joint employees of the L & N and its affiliated carriers is supported by substantial evidence.

The L & N argues in rebuttal that this is not a proper case for such a determination because there is no evidence to support a finding that AJT as a carrier and L & N as a carrier jointly employ AJT's employees. It is contended that the finding actually made by the Commission that AJT personnel is jointly employed by L & N, Georgia, and A & WP is legally unsound because such a determination disregards AJT's status as a carrier.

The L & N insists that under the opinions in such cases as United States v. Brooklyn Eastern Dist. Terminal, 249 U. S. 296, 39 S. Ct. 283, 63 L. Ed. 613 (1919); United States v. State of California, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936); Union Stock Yard & Transit Co. v. United States, 308 U. S. 213, 60 S. Ct. 193, 84 L. Ed. 198

(1939), and United States v. Atlanta Terminal Co., 5 Cir., 260 F. 779 (1919), the corporate character of AJT with respect to its employees being within the ambit for protection under Section 5(2)(f) depends not upon whether it is incorporated or unincorporated but depends upon *what it does.*

The plan and practice for operation of AJT has been: Atlanta Joint Terminals is unincorporated and in the written agreement executed April 1, 1907, between L & N and Atlantic Coast Line, lessees of the Georgia Railroad, first parties; Atlanta & West Point Railroad Company, for itself and as lessee of the Atlanta Belt Railroad, second party, and L & N, third party, is referred to as "an arrangement for the common use of terminals and not a partnership between the parties hereto." The duration of the "arrangement" was for the term of a lease to Georgia Railroad and its lessees, L & N and Atlantic Coast Line, which will expire April 1, 1980.

Each of the parties conveyed its ownership and leasehold property rights in the trackage, buildings, terminal facilities, and appurtenances in the area of the terminal. Rental for the terminal equivalent to five per cent interest on the agreed valuation for the properties of Georgia was provided. Reimbursement for investments and expenditures by the other participants in the proposed operation was to be prorated according to the ratio of the cars, engines and cabooses of each carrier entering and leaving the terminal properties to the total number of cars, engines and cabooses of all the carriers. Provision was made for proration for payment of state, county and municipal taxes and for the cost of maintenance and operation of the properties and supervision of the terminal.

The necessary switch engines were furnished by the parties based upon estimates of the work requirements of each participant. Provision was made for the creation of

funds with which to pay locomotive and car repairs and supplies.

The general supervision of the terminal property was vested in a board of control comprised of the persons holding the position of general manager with the parties to the agreement. The board made the rules for the government of employees and operation of the terminal, and appointed a superintendent of terminals who had charge of the properties and operation as a joint officer and to whom all officers, agents and employees reported. The superintendent of terminals appointed a joint local agent to be in charge of the freight houses, transfer platforms and team delivery tracks. With the approval of the board of control, he appointed a mechanical foreman to supervise the operation of shop and roundhouse facilities.

In addition to performing all auditing functions of the terminal, Georgia rendered and paid bills to other railroads and industries in connection with local switching, handled claims for personal injuries and loss and damages to freight, and had charge of admission of other carriers to use of the terminal. Georgia maintained the bank checking accounts of the terminal in the names of Georgia's lessees and issued the terminal pay checks and drafts in payment of claims allowed for injuries to employees of the terminal.

The chairman of AJT's board of control is the general manager of the Georgia appointed by Georgia's executive committee, who were and are the presidents of the L & N and Atlantic Coast Line. The chairman also serves as president and general manager of A & WP and Western Railway of Alabama and is the chief executive officer of those railroads and AJT.

AJT for years has been subject to the hours of service law as a common carrier. Its employees were represented by unions separate and distinct from those representing employees of the L & N, and since 1937 the National Me-

diation Board has certified such representatives of AJT's employees as provided by the Railway Labor Act, 45 U.S.C. § 152, Ninth. The AJT employees have a union shop agreement and L & N employees do not. All of the terminal employees' bargaining agreements are conducted and made with AJT and disputes and claims arising from such agreements have been taken to the National Railroad Adjustment Board. The L & N has participated in none of such agreements, negotiations or proceedings. The employees of AJT and the employees of L & N have no employment or seniority rights either in the other.

The plan and practice in the operation of AJT has been as set out above since its organization.

All of these facts were recognized by the Commission in its decision in this case admitting that AJT is a separate, unincorporated association and is a common carrier. Yet, the Commission concluded that AJT employees were entitled to protection as required by Section 5 (2) (f) as employees of L & N if, in fact, their employment was adversely affected as a result of or in anticipation of the merger.

In the case of Railway Labor Executives' Association v. United States, D.C. Va., 216 F. Supp. 101 (1963), employees of the Chesapeake & Ohio Railway Company at the Main Street station in Richmond, Virginia, sought to annul and vacate certain orders of the Commission denying them the protective benefits provided under Section 5(2) (f) of the statute. The Main Street station had been built and occupied since 1901 in a joint operation by the C & O and the Seaboard Air Line Railroad. Up to 1959, the terminal was operated by employees of the C & O under a contractual arrangement with Seaboard involving an apportionment and reimbursement of its proportionate cost of the operation

by Seaboard. In 1959, the Commission granted Seaboard authority to acquire joint control and use of the Broad Street station and following the acquisition Seaboard abandoned any use of the Main Street station. Seaboard's withdrawal decreased the number of C & O employees needed to operate that terminal. The employees who were furloughed or laid off because of the reduction brought suit charging that they were railroad employees affected by the Commission's order granting Seaboard authority to acquire the Broad Street station and that their employment was not protected in the order as required by the Act.

The Commission's action in denying C & O's furloughed employees protection under Section 5(2) (f) was upon the basis that C & O was not a party to or involved in the proceeding before the Commission by which Seaboard obtained authority to acquire the Broad Street station. The Commission conceded in its reports and orders that the plaintiffs were railroad employees affected by the transaction but held they were not employees affected within the purview of Section 5(2) (f) of the Act. The court held that the interrelation between Seaboard and C & O at the Main Street station was such as to give the plaintiff employees a right to the relief they sought. The orders of the Commission were vacated by the Court with instructions that the plaintiff employees be treated as coming within the ambit of Section 5(2) (f).

The case of Railway Labor Executives' Association v. United States, D. C. Va., 226 F. Supp. 521 (1964), arose out of the Commission's approval of the acquisition of stock control of the Central of Georgia Railroad Company by Southern Railway. When it approved the transaction the Commission had full knowledge that Southern proposed to consolidate Central's freight agencies, yards, shops and accounting department into those of Southern which would, and did, result in job losses and hardships to many em-

ployees. In recognition of such hardships and losses, the Commission imposed conditions for the protection of the employees affected by the transaction which it determined met the requirements of Section 5(2) (f) of the Act and provided fair and equitable treatment of all employees coming under the protective aegis of the statute. In describing the duty of the Commission under Section 5(2) (f) at page 523 of its opinion, the court said:

> "The Commission is free in its discretion to make different findings, to reach different conclusions, and to impose different conditions *predicated upon its evaluation of the facts of record relating to each individual transaction*, so long as it does not fail to meet the minimum statutory criteria and is fair and equitable." (Emphasis added.)

It was decided in that case that the Commission's order had provided proper measures of protection for the employees of Central affected by the transaction which resulted in hardships and job losses.

In his opinion in Brotherhood of Maintenance of Way Employees v. United States, D. C. Mich., 221 F. Supp. 19, 30 (1963), Judge O'Sullivan said:

> "In all events, it is not our function to substitute our judgment for that of the Commission. Minneapolis & St. Louis R. Co. v. United States, 361 U. S. 173, 188, 80 S. Ct. 229, 4 L. Ed. 2d 223. The Commission's wisdom and experience, not ours, must determine whether its approval of the C&O—B&O affiliation is consistent with the public interest. McLean Trucking Co. v. United States, 321 U. S. 67, 87, 64 S. Ct. 370, 88 L. Ed. 544."

In considering the respect that courts should manifest for the wisdom and experience of the Interstate Commerce

Commission in Minneapolis & St. Louis R. Co. v. United States, 361 U. S. 173, 187, 188, 80 S. Ct. 229, 238, 4 L. Ed. 2d 223, the Supreme Court said:

> "Resolution of the conflicting considerations 'is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms." 79 Cong. Rec. 12207. "The wisdom and experience of that commission," not of the courts, must determine whether the proposed [acquisition] is "consistent with the public interest." ' " (Citing cases.)

The above statement was made by the Supreme Court as to the significance and purpose of the statute here in question although not involving the identical issue. The Supreme Court said that the wisdom and experience of the Commission, not of the courts, must determine questions arising under Section 5(2) of the Act, 49 U.S.C. § 5(2).

In this case, we are not convinced that the Commission committed an error of law or that its action was arbitrary, capricious or an abuse of discretion. In our opinion, its findings of fact are supported by substantial evidence. We, therefore, are not authorized to disturb the conclusions of this experienced agency of the Government charged with manifold duties in the field of transportation, no small part of which is in the area of mergers and affiliations in an effort to "slow down and arrest the economic deterioration of the American railroads."

The complaint in this action should be dismissed and a judgment so providing will be entered.

Appendix A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3761

Louisville and Nashville Railroad Company, - - Plaintiff,

v.

United States of America and
Interstate Commerce Commission, - - Defendants,
and
Railway Labor Executives' Association and
Atlanta Employees Protective Association, - - Intervening Defendants.

ORDER.

On August 13, 1965, the plaintiff, Louisville and Nashville Railroad Company, filed its motion to set aside the judgment entered by the Clerk of this Court on August 9, 1965, so that the Court may clarify and correct its opinion filed August 5, 1965. Plaintiff moves to clarify and correct the following portions of said opinion:

(a) "The controversy here stems from the Commission's report and order of March 1, 1957, in which the Commission indicated that the protective benefits provided for adversely affected employees of the L & N and NC & StL would likewise extend to and cover employees of AJT. 295 I.C.C. 457, 502." (Page 1.)

(b) "It ordered that the AJT employees were entitled to protection under Section 5(2) (f) of the Act, as their employment was adversely affected by the merger. 312 I.C.C. 676." (Page 2.)

(c) "All of these facts were recognized by the Commission in its decision in this case admitting that AJT is a separate, unincorporated association and is a common carrier. Yet, the Commission concluded that the merger of the NC & St L with L & N constituted a transaction which affected employees of AJT as employees of L & N and provided for their protection as required by Section 5(2) (f)." (Page 7.)

(d) "The vice president and general manager of L & N is the general manager of the terminal." (Page 7.)

August 30, 1965, counsel for the defendants, United States of America and Interstate Commerce Commission, filed a reply opposing plaintiff's motion. The Court has considered the defendants' objections and overrules said objections.

IT IS ORDERED that the judgment heretofore entered on August 9, 1965, be and hereby is set aside so that the Court's opinion dated August 5, 1965, may be amended in the following respects:

(a) Paragraph 2 on page 1 is amended to read:

"The controversy here stems from the Commission's report and order of March 1, 1957, in which the Commission indicated that the protective benefits provided for the adversely affected employees of the L & N and NC & StL would likewise extend to and cover employees of AJT, if, in fact, they were adversely affected as a result of the merger. 295 I.C.C. 457, 502."

Appendix A

(b) The last sentence of paragraph 2 on page 2 is amended to read:

> "It ordered that the AJT employees were entitled to protection under Section 5(2)(f) of the Act if their employment was adversely affected by the merger. 312 I.C.C. 676."

(c) Paragraph 1 on page 7 is amended by deleting the last sentence.

(d) Paragraph 4 on page 7 is amended to read:

> "All of these facts were recognized by the Commission in its decision in this case admitting that AJT is a separate, unincorporated association and is a common carrier. Yet, the Commission concluded that AJT employees were entitled to protection as required by Section 5(2)(f) as employees of L & N if, in fact, their employment was adversely affected as a result of or in anticipation of the merger."

A judgment will be entered dismissing the complaint.

August 31, 1965

(s) Shackelford Miller, Jr.,
Judge, U. S. Court of Appeals

(s) Henry L. Brooks,
Judge, U. S. District Court

(s) Roy M. Shelbourne,
Senior Judge, U. S. District Court
Sitting by Designation

A Copy: Attest
Martin R. Glenn, Clerk
By (s) F. Allen,
Deputy Clerk.

Appendix A

Joseph L. Lenihan,
H. G. Breetz,
Louisville and Nashville Railroad Company,
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Counsel for Plaintiff.

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Railway Labor Executives' Association.

John W. Chambers,
Citizens & Southern National Bank Building,
Atlanta, Georgia,
Counsel for Intervening Defendant,
Atlanta Employees Protective Association.

Appendix A

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

Civil Action No. 3761

Louisville and Nashville Railroad Company, - Plaintiff,

v.

United States of America and
Interstate Commerce Commission, - - - Defendants,
and
Railway Labor Executives' Association and
Atlanta Employees Protective Association, - Intervening Defendants.

JUDGMENT—Entered September 1, 1965.

This action came on for hearing before the Court (Honorable Shackelford Miller, Jr., United States Court of Appeals Judge, Honorable Henry L. Brooks, United States District Judge, and Honorable Roy M. Shelbourne, Senior District Judge Sitting by Designation) and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the complaint in this action be dismissed, and that the defendants, United States of America and Interstate Commerce Commission, and the intervening defendants, Railway Labor Executives' Association and Atlanta Employees Protective Association, recover of the plaintiff, Louisville and Nashville Railroad Company, their taxable costs of the action.

Appendix A

Dated at Louisville, Kentucky, this 1st day of September, 1965.

(s) Martin R. Glenn,
Clerk of Court.

cc:—Mr. Joseph L. Lenihan,
Mr. H. G. Breetz,
908 West Broadway,
Louisville, Kentucky.

—Mr. Ernest W. Rivers,
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—Mr. Leonard S. Goodman,
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—Mr. Robert E. Hogan,
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—Mr. John W. Chambers,
Citizens & Southern National Bank Bldg.,
Atlanta, Georgia.

Appendix A

FINANCE DOCKET No. 18845

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., MERGER, ETC.

Decided October 26, 1961

Upon further hearing found:

1. The Atlanta Joint Terminals is an unincorporated terminal service agency created by the Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company jointly, as lessees of the Georgia Railroad; the Atlanta & West Point Railroad Company; and the Louisville and Nashville Railroad Company in its individual interest, under terms of an agreement dated April 1, 1907, covering joint use and operation of terminal properties and facilities in Atlanta, Ga.
2. Employees of Atlanta Joint Terminals are joint, or common, employees of the aforesaid railroad carriers under the terms of the said agreement of April 1, 1907.
3. Report and order herein dated March 1, 1957, modified by incorporating therein by reference the facts, conclusions, and findings contained in the report and order on further hearing with respect to the status of Atlanta Joint Terminals and the employees thereof, and protection of employees affected as an incident to approval of the merger, et cetera, of The Nashville, Chattanooga & St. Louis Railway into the Louisville and Nashville Railroad Company, et al. Prior report 295 I.C.C. 457.

Appearances as in prior report and, in addition:

H. G. Breetz and *C. D. Temple* for applicants.

John W. Chambers and *Terry P. McKenna* for employees protective association, intervener.

Appendix A

REPORT OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

Exceptions to the report recommended by the hearing examiner were filed by the Louisville and Nashville Railroad Company (Louisville & Nashville) and the Railway Labor Executives' Association (the association). The association and the Atlanta Employees Protective Association replied to the Louisville & Nashville's exceptions and the Louisville & Nashville replied to the association's exceptions. The case has been argued orally.

By report and order in this proceeding, dated March 1, 1957, 295 I.C.C. 457, we authorized, among other things, the merger of the properties and franchises of The Nashville, Chattanooga & St. Louis Railway (Chattanooga) into the Louisville & Nashville for ownership, management, and operation, and indirect control by the Atlantic Coast Line Railroad Company (Coast Line) of the surviving corporation through ownership of capital stock. We prescribed the same conditions as were imposed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, for the protection of railway employees who would be adversely affected by the transaction. As the result of contentions by the association, first introduced at oral argument, we held that employees of the Atlanta Joint Terminals (Terminals) would be protected by the employee conditions but that such conditions would not be retroactive.

Following the denial of a petition for reconsideration filed by Terminals' employees, the overruling of a motion for leave to file a petition for leave to intervene filed by the Louisville & Nashville, and the institution, by the latter, of litigation in the United States District Court,[1] on our own motion we reopened the proceeding by order dated

[1]Western District of Kentucky, civil action No. 3761.

June 9, 1959, for further hearing. The sole purpose of further hearing was to determine the nature and organizational character of Terminals, the relationship of it and its employees, if any, to the Louisville & Nashville, and the extent to which, if any, our report and order herein of March 1, 1957, should be modified insofar as the protective conditions prescribed therein were made applicable to the employees of Terminals. Further hearing was held at which the parties denoted their understanding, in compliance with our directive, that the questions to be determined would not require evidence of whether the employees of Terminals have been or would be adversely affected as a result of the approved merger. The parties agreed that, pursuant to a statement contained in our prior report, if it should be found that our jurisdiction extends to providing protection to the employees of Terminals, proof of the effect upon any particular employee or group of employees would be resolved by following the arbitration procedures provided in condition No. 8 prescribed in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, which are incorporated in the *New Orleans Union Passenger Terminal Case* conditions. The protection sought on behalf of the employees of Terminals would be fully provided without modification of the conditions specified in our report of March 1, 1957, if, upon the further record, it is established that the employees of Terminals occupy status as employees of the carriers involved in the merger.

Terminals was created under the terms of an agreement executed April 1, 1907, but made effective from July 1, 1904, as a joint railroad terminal to be used and operated in common by the parties to the agreement. It is not a corporation and is described in the agreement as "an arrangement for the common use of terminals and not a partnership between the parties hereto." The parties to the agreement are the Louisville & Nashville and the Coast Line,

lessees of the Georgia Railroad,[2] first parties; the Atlanta & West Point Railroad Company (West Point) for itself and as lessee of the Atlanta Belt Railroad, second party; and the Louisville & Nashville, third party. The agreement is to remain effective during the entire remaining term of a lease dated May 7, 1881, with expiration date of April 1, 1980, between the Georgia Railroad & Banking Company and one William M. Wadley (expires April 1, 1980), which lease had been assigned to the Louisville & Nashville and the Coast Line. Unless otherwise stated, the term "the Georgia," as used hereinafter, denotes the Georgia Railroad and the Louisville & Nashville and the Coast Line as its joint lessees.

To accomplish the purpose of combining their respective terminal facilities and operations at Atlanta, each party to the agreement grants or conveys to Terminals its entire ownership and leasehold property rights, titles, and interests in existing and proposed trackage, buildings, switches, turnouts and other improvements, and freight warehouses, real estate, and appurtenant terminal facilities. The trackage involved totals 32.77 miles, extending from Central Avenue eastward 2.24 miles to about Hurt Street and to the yard limit board south of Wylie Street on the West Point's freight main line. In addition, Terminals has trackage rights over and performs terminal services over the Georgia's Clifton main line extending about 2 miles east of Hurt Street; over tracks of West Point to Allene Avenue; and over the Louisville & Nashville's belt line extending to the Hills Park yard of the Chattanooga.

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[2]The Georgia Railroad is an unincorporated lessee organization in which name, and through which is maintained and operated the railway properties of the Georgia Railroad & Banking Company. In addition to their joint control of the Georgia, the Louisville & Nashville and the Coast Line jointly control the West Point through ownership of stock and the Coast Line controls the Louisville & Nashville through stock ownership.

Appendix A

Rental for the terminal, equivalent to 5 percent interest on the agreed valuation of the properties of the Georgia, and expenditures of the Louisville & Nashville for certain new construction to have been completed about July 1, 1907, and reimbursement of investments and expenditures by the other parties, are prorated according to the ratio of the cars, engines, and cabooses of each carrier leaving and entering the terminal properties, to the total number of cars, engines, and cabooses of all the carriers. Appropriate similar methods of proration are provided for the payment of State, county, and municipal taxes; the cost of maintenance of jointly used property and all its improvements; the aggregate wages of the superintendent of terminals, his office force, and all other employees engaged in yard service; and the expenses of shifting of cars, marshalling and distributing of trains, and switching within the yard limits, including fuel, water, and supplies for, and ordinary running repairs to, switch engines. The required number of switch engines are furnished jointly by the parties to the agreement based upon quotas related to the relative proportions of the work performed for each of the parties. The aggregate wages of shop and roundhouse employees and all other expenses incident to the care of locomotives are computed monthly; the expenses connected with the care of switching locomotives are divided among the parties on the same basis that switch engines are agreed to be furnished by the parties; and the expenses connected with road service locomotives are divided among the parties in the same proportion that the number of such locomotives of the respective parties bears to the whole number of road locomotives cared for at the roundhouse. Other formulas, based upon the cost of providing the service plus 10 percent, are prescribed for the payment of repairs to road service locomotives and to cars, and other provisions relate to the supply of, and payment for, fuel,

water, and oil. Agency expenses in offices, freight houses, and transfer platforms for salaries, light, heat, water, and supplies are divided among the parties in the same proportion that the tonnage of freight of each party billed locally to and from Atlanta bears to the whole freight tonnage so billed at the aforesaid agency.

Under the terms of the agreement, general supervision of the terminal property is lodged with a board of control composed of the general managers of the parties to the agreement. The board of control formulates and adopts rules for the government of employees and for operation of the terminal, and appoints a superintendent of terminals who has immediate charge of the terminal yards as a joint officer and to whom all officers, agents, and employees of the joint terminals report. The superintendent of terminals appoints a joint local agent to be in charge of the freight houses, transfer platforms, and team delivery tracks; and, with the approval of the board of control, the superintendent of terminals appoints a mechanical foreman to supervise the operation of the shop and roundhouse and adjunct facilities. All accounting functions of the terminal, under the provisions of the agreement, are performed by the Georgia's accounting department for which the Georgia receives reasonable compensation as may be determined from time to time by the board of control. Additional provisions pertain to such matters as the rendering and payment of monthly bills; local switching to and from other railroads and to and from industries in and near Atlanta; the handling of claims for personal injuries, damage to equipment, and loss and damage to freight, reference being made to the terminal employees as joint or common employees; settlement of disputes as to operation of the terminals or construction of the agreement; and periodic revision of rental and valuation factors. Amendments to the agreement dated April 1, 1907, March 13, 1917, and May 6,

1947, modified certain provisions of the basic agreement in respects not here material.

Although the Louisville & Nashville voluntarily ceased using the terminal facilities for yard operations at Atlanta during November 1955, and, as a consequence Terminals discontinued operations under trackage rights over the Louisville & Nashville's belt line to and from the yard of the Chattanooga,[3] and lost about one-third of its usual volume of business, such changes have not resulted in cancellation or modification of the 1907 agreement as amended.

As noted, the board of control of Terminals is comprised of the general managers of the Georgia, the West Point, and the Louisville & Nashville. The general manager of the Georgia is appointed by the Georgia's executive committee, comprised of the presidents of the Louisville & Nashville and the Coast Line and the chief executive officer of the Georgia. The present general manager of the Georgia is also its chief executive officer, as well as general manager and chief executive officer of the West Point and of the Western Railway of Alabama (the Alabama). In addition, he serves as chairman of the board of control of Terminals and chief executive officer of the terminal. Such officers of Terminals as the superintendent of terminals (title changed to "terminal trainmaster" in November 1955), joint freight agent, and mechanical foreman have practically always been appointed from the ranks of Terminals or the Georgia. There is also an officer who serves as director of personnel of the Georgia, the West Point, the Alabama, and Terminals. All of these officers report to the chairman of the board of control and he, in turn, reports to the board. There have been no changes in the member-

[3]The reciting herein of the change in service in no manner constitutes an expression that such abandonment of operation requires the issuance of a certificate of public convenience and necessity under section 1(18)-(22).

ship of Terminals' board of control as a consequence of the merger of the Louisville & Nashville and the Chattanooga.

The work of the terminal is performed by employees each of whom has seniority on Terminals' individual rosters. These employees have no seniority or employment rights on the lines of the Louisville & Nashville or of the other tenants, and persons employed for work on the lines of the Louisville & Nashville or the other tenants have no employment rights in Terminals' territory. On occasions when emergencies have required Terminals' employees to perform services outside the terminal limits on lines other than those of Terminals the work has been treated as on a foreign line and extra wages have been paid.

Applications for employment at Terminals are approved by the director of personnel. He negotiates labor agreements and handles grievances respecting all crafts and class of employees, and his name is certified to the National Railroad Adjustment Board as the highest operating officer handling labor matters pertaining to the terminal. He also performs the same functions for the Georgia, the West Point, and the Alabama. Applicants for employment at the terminal execute an application form which shows the names of the West Point, the Alabama, the Georgia, and Terminals in its caption. The labor agreements usually are in the name of Terminals individually or show the names of the West Point, the Alabama, and the Georgia together with that of Terminals. A representative agreement provides that seniority of the employees is confined to seniority districts coinciding with the railroad property upon which employed. An earlier agreement covering yardmen at the terminal shows the names of the West Point, the Louisville & Nashville, and the Georgia, along with that of Terminals.

Appendix A

Following settlement of a dispute before the National Mediation Board, Terminals applied to become a party to the Washington Job Protection Agreement of May 1936. The application was accepted and acted upon in Terminals' individual name and capacity, and when approved effective November 1, 1941, Terminals became a "single carrier party" listed in the southeastern territory. The Coast Line and the Louisville & Nashville were admitted as parties to the agreement on July 8, 1939, and February 10, 1942, respectively. The "Atlanta & West Point R.R. Co.—Western Ry. of Alabama," and the "Georgia Railroad" were admitted as parties to the agreement on July 17, 1944.

Under the joint accounting arrangements, the Georgia maintains the bank checking accounts of the terminal in the name of the lessee organization of the Georgia, and issues Terminals' paychecks and drafts and checks in payment for claims allowed for injuries suffered by the employees of the terminal. Terminals files no separate annual reports with the Commission or other State and Federal agencies. Data required on its accounts are embraced in the annual reports filed with this Commission by the Georgia. Terminals' property tax returns in Georgia are made in the name of Georgia Railroad & Banking Company, and some nonoperating property tax returns are made in the name of the Georgia.

Employees at the terminal are covered by group medical insurance under a master policy issued by the insurance company to the Louisville & Nashville. Various decided and pending litigations in law and equity brought in county and other courts in Georgia by or against the terminal have been filed in the name of Coast Line and the Louisville & Nashville as lessees of the Georgia Railroad & Banking Company; the West Point; and the Louisville & Nashville, "all operating yards and terminal facilities at Atlanta under the name and style of Atlanta Joint Terminals," or "doing

business as Atlanta Joint Terminals" as parties plaintiff or parties defendant. Federal income tax deductions withheld on behalf of terminal employees are reported in the name of "Georgia Railroad Lessee Organization" without reference to Terminals.

The examiner found, upon further hearing, that because the entire board of control of the terminal is composed of representatives of the management of Georgia Railroad's lessee organization, the West Point, and the Louisville & Nashville, the facts demonstrate that the Louisville & Nashville and carriers affiliated with it control or manage, or have the power to exercise control or management of, Terminals, a fact which is not altered by the circumstance that the control lies partly with other carriers of the Louisville & Nashville-Coast Line system; that employer obligations to provide compensation, job security, and related benefits to Terminals' employees rests upon the controlling carriers; and, to the extent that the Louisville & Nashville, in direct relation to the services provided it by Terminals, proportionately shares in the meeting of the net operating expenses of Terminals, the employees involved are identifiable as employees of the Louisville & Nashville. He found that the same situation pertains to the other carriers and carrier interests involved in the terminal arrangement. On the basis thereof, he concluded that the conditions provided to protect railroad employees of the Louisville & Nashville and the Chattanooga who might be in a worse position with respect to their employment as a consequence of the merger approved in this proceeding, necessarily applies to the employees of Terminals.

The Louisville & Nashville excepts to the hearing examiner's conclusion that Terminals' employees are entitled to the benefits of the protective conditions imposed by our report and order of March 1, 1957. The Railway Labor Executives' Association did not except to the findings and

conclusions in the recommended report. Its exceptions were filed for the purpose of preserving arguments which the hearing examiner rejected or found unnecessary to consider.

In essence, it is the position of the Louisville & Nashville that the examiner erred in not finding (1) that Terminals is a common carrier separate and distinct from the Louisville & Nashville and from the other parties to the agreement setting up the terminal, and (2) that since Terminals was not an applicant or participant in the Louisville & Nashville-Chattanooga merger transaction, we are without authority to impose protective conditions for the benefit of Terminals' employees. Specifically, the Louisville & Nashville contends that Terminals is a separate common carrier by railroad by virtue of its performance of terminal services at Atlanta (citing *Union Stock Yards Co.* v. *United States,* 308 U. S. 213; *United States* v. *California,* 297 U. S. 175; *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296; *Status of Allegheny & S. S. Ry. Co.,* 277 I.C.C. 119; *New Orleans Passenger Terminal Case,* 267 I.C.C. 763; and *Operation Over Tracks of Port Term. R. Assn.* 150 I.C.C. 402), and that Terminals has been regarded as a separate carrier in the field of labor relations. The Louisville & Nashville asserts that the examiner failed to accord due weight to such matters as that Terminals became a party to the Washington Job Protection Agreement in 1941, while the Louisville & Nashville, the Georgia, and the West Point did not do so until later dates; that Terminals' employees have a union shop agreement while persons employed on the lines of the Louisville & Nashville do not; that Terminals' employees have no employment rights on the lines of the Louisville & Nashville and persons employed on the lines of the Louisville & Nashville have no employment rights within the terminal; and that certain terminal employees have received extra pay for work on

foreign lines when they have performed work outside of the terminal limits on lines of other carriers, including the Louisville & Nashville.

Assuming, as we do, that the nature of the services performed by Terminals requires that it be considered a common carrier as that term is defined in section 1(3)(a) of the Interstate Commerce Act, this is not dispositive of the issue of the relationship of the terminal employees to the Louisville & Nashville. In our opinion, even if Terminals should properly be considered a carrier for purposes of regulation under the act, we are not precluded from finding that there exists between Terminals' employees and the Louisville & Nashville an employee-employer relationship. Nor does the fact that Terminals has been treated as a carrier in the field of labor relations preclude such a finding. While the factors relied on by the Louisville & Nashville have been considered along with all of the facts and circumstances embodied in the record before us, we do not regard them as controlling.

In summary, Terminals is an unincorporated terminal service agency created by the Louisville & Nashville and its affiliated carriers to be used and operated in common by them. Its operations are controlled directly by management representatives of the carriers which formed it, and those carriers share the costs of its operation on a pro rata basis. The fiscal activities and the maintenance of accounting records with respect to the terminal's revenues and expenses and their apportionment among the constituent carriers, and the filing of periodic reports and returns to Federal and State tax and regulatory agencies are performed by the accounting department of the Georgia. No property tax returns, withholding statements for income tax purposes, or Federal or State income tax returns are filed in the name of Terminals. It has no bank accounts.

Payments to Terminals' employees for wages and for settlement of claims arising from injuries are paid by checks or drafts drawn against the bank accounts of the Georgia, and, in turn, are charged against the terminal operation. Additionally, Terminals' employees are referred to as joint or common employees in the agreement of 1907, and court actions by or against Terminals specifically designate jointly the carriers who are parties to the agreement.

In our view, Atlanta Joint Terminals is not a business organization independent of the railroads which created, operate, and control it as their joint agency. Their continuing control, and power to exercise control and management, of the terminal's organization and operations obviously includes ultimate control over the employees of the terminal. Likewise, the employer obligations to provide compensation, job security, and related benefits rest upon the controlling carriers.

We have consistently interpreted section 5(2)(f) of the Interstate Commerce Act as not requiring us to impose protective conditions for the benefit of employees who cannot, in the circumstances of a particular case, be regarded as employees of a carrier which is an applicant or participant in a transaction before us for approval. See *Baltimore & O. R. Co. Operation*, 261 I.C.C. 615; Finance Docket No. 18534, *Spartanburg Terminal Co. Construction*, 295 I.C.C. 806 (not printed in full) decided July 10, 1957. However, under the facts of record in the present proceeding, the employees of Terminals must be regarded as being, in reality, joint or common employees of the Louisville & Nashville and its affiliated carriers, the Georgia and the West Point, with which it created and bears ultimate responsibility for the operation of the terminal. Because of the described employe-employer relationship, the terminal employees are entitled to the benefit of employee protective

conditions. Cf. *Gulf, M. & O. R. Co. Abandonment*, 282 I.C.C. 311.

We conclude that to the extent, if any, that the terminal employees are adversely affected in their employment by the merger of the Louisville & Nashville and the Chattanooga, they are entitled to the benefit of the employee protective conditions imposed by us in our prior report and order. Questions as to whether, when, and to what extent the terminal employees, or any of them, have been affected as a result of, or in anticipation of, the merger, are not before us; and any dispute as to such matters is to be resolved under the arbitration procedures provided in the prescribed conditions.

An appropirate order will be entered.

VICE CHAIRMAN MURPHY and COMMISSIONERS HERRING, BUSH, and TUCKER did not participate in the disposition of this proceeding.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 26th day of October, A.D. 1961.

Finance Docket No. 18845

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., MERGER, ETC.

Further investigation of the matters and things involved in this proceeding having been made, further hearing having been held, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report, and the hearing examiner's report on further hearing, are hereby referred to and made a part hereof:

Appendix A

It is ordered, That the report of the Commission in this proceeding, dated March 1, 1957 (295 I.C.C. 457), be, and it is hereby, modified by incorporating therein by reference the facts, conclusions, and findings contained in the aforesaid report of the Commission on further hearing in respect of the status of Atlanta Joint Terminals and the employees thereof, and protection of employees affected as an incident to approval of the merger, etc., of The Nashville, Chattanooga & St. Louis Railway into the Louisville and Nashville Railroad Company, et al.; and

It is further ordered, That, except as herein modified, the said report and order of March 1, 1957, shall remain in full force and effect.

By the Commission.

Harold D. McCoy
Secretary

(SEAL)

APPENDIX B

49 U.S.C. § 1(3)(a)

§ 1, par. (3). **Definitions.** (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

Appendix B

49 U.S.C. § 5(2)

§ 5, par. (2). Unifications, mergers, and acquisitions of control. (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested

parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12

of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 792

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, RAILWAY LABOR EXECUTIVES' ASSOCIATION, and ATLANTA EMPLOYEES PROTECTIVE ASSOCIATION, *Appellees.*

On Appeal From the United States District Court for the Western District of Kentucky

MOTION OF APPELLEE RAILWAY LABOR EXECUTIVES' ASSOCIATION TO AFFIRM

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IN THE

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OCTOBER TERM, 1965

No. 792

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, RAILWAY LABOR EXECUTIVES' ASSOCIATION, and ATLANTA EMPLOYEES PROTECTIVE ASSOCIATION, *Appellees.*

On Appeal From the United States District Court for the Western District of Kentucky

MOTION OF APPELLEE RAILWAY LABOR EXECUTIVES' ASSOCIATION TO AFFIRM

The Railway Labor Executives' Association (Association), one of the appellees in the above-entitled case, respectfully moves this Court, pursuant to Rule 16 of the Court's Revised Rules, to affirm the final judgment and decree of the District Court on the ground that the questions presented by the appellant Louisville and Nashville Railroad Company (L&N) are so insubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from a final judgment and decree entered on September 1, 1965, by the United States District Court for the Western District of Kentucky at Louisville (R. 56), sitting as a three-judge court specially constituted pursuant to Title 28 of the United States Code, Sections 2284 and 2325, dismissing the complaint of the L&N, as amended, (R. 6-13) which sought to set aside and annul orders of the Interstate Commerce Commission, dated March 1, 1957, July 10, 1957, and October 26, 1961, insofar as those orders provided protection pursuant to the provisions of Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C.A., Section 5(2)(f)) for railroad employees engaged in the operations of the Atlanta Joint Terminals (AJT), a terminal operation of the L&N in Atlanta, Georgia, adversely affected by the merger of the L&N and the Nashville, Chattanooga & St. Louis Railway (NC&StL).

The orders of the Commission, which the L&N sought by its complaint in the District Court to have set aside in part, were entered in an administrative proceeding identified as *Louisville and Nashville Railroad Company, et al., Merger, Etc.* (Finance Docket No. 18845). This proceeding concerned a joint application of the L&N and NC&StL for Commission approval pursuant to Section 5(2) of the Interstate Commerce Act (49 U.S.C.A., Section 5(2)) of the merger of the properties and franchises of the two carriers. (R. 7)

The Association intervened and participated in the proceedings on behalf of the twenty-three standard national and international railway labor organizations

affiliated with the Association and the railroad employees for which these organizations are the duly designated representatives under the Railway Labor Act (45 U.S.C.A., Section 151 et seq.), including employees here involved. The Association opposed the approval of the merger on the ground that the transaction was not consistent with the public interest. In addition, the Association supported adequate employee protective conditions for the benefit of railroad employees affected by the transaction if it was approved by the Commission, including those employees engaged in the terminal operations of the L&N in Atlanta, Georgia, doing business as the AJT. (Exhibit "A" to Amended Complaint, Sheets 64-67).

Section 5(2)(f) of the Interstate Commerce Act imposed a duty on the Commission, as a condition of its approval of the merger application, to "require a fair and equitable arrangement to protect the interests of the railroad employees affected." This statutory provision is quoted in full in Appendix B to the Jurisdictional Statement.

The Commission by its report and order of March 1, 1957, approved the merger and imposed, as a condition of its approval for the protection of employees, the so-called "New Orleans conditions," derived from the Commission's decision in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271, and stated its intent that such conditions should extend to and cover railroad employees engaged in the operations of the AJT (Exhibit "A" to Amended Complaint, Sheet 66).[1]

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[1] The Commission's action was formalized in its order of the same date. (Exhibit "B" to Amended Complaint).

In accordance with its established practice, the Commission did not decide whether in fact any particular railroad employee engaged in the operation of the AJT had been or would be adversely affected by the transaction, but left to arbitration any dispute between the parties on such question.

The L&N did not file a petition for reconsideration of the Commission's Report and Order within the 30 days provided therefore by the Commission's rules (49 C.F.R., Section 1.01). Indeed it opposed the subsequent petition of the Atlanta Employees Protective Association (AEPA), composed of employees engaged in the AJT operation, to intervene in the proceeding and obtain better protective conditions. The L&N opposition was based on the ground, *inter alia,* that the employees engaged in the AJT operation were fully protected by the Commission's order.[2]

On July 10, 1957, the Commission issued an order permitting AEPA to intervene, but refused to reconsider the agency's order of March 1, 1957, on the ground that the employees engaged in the AJT operation were fully protected by that order.[3]

Thereafter, on or about August 31, 1957, the L&N consummated the merger thus approved. (Jur. Statement, 2a).

Approximately 16 months after issuance of the Commission's order of March 1, 1957, and a year after the consummation of the merger, the L&N filed with

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[2] Exhibits 1, 1a, and 2 of "Exhibits to Brief of Railway Labor Executives' Association" before District Court, a part of the record certified to this Court; Jur. Statement, 2a.

[3] Exhibit 3 to "Brief of Railway Labor Executives' Association".

the Commission a petition for reconsideration of the March 1, 1957, order insofar as it included therein protection for the employees engaged in the AJT operation.[4] The Commission on February 3, 1959, denied this petition as untimely filed.[5]

Thereafter on March 6, 1959, the L&N filed its original complaint in the District Court to set aside the Commission's orders of March 1, 1957, and July 10, 1957, insofar as those orders provided protection for employees engaged in the AJT operation. (Jur. Statement, 3a).

On June 9, 1959, the Commission, over the objections of the Association, reopened the administrative proceedings to determine the organization and structure of the AJT and the relationship of its employees to the L&N. (Jur. Statement, 2a). After full evidentiary hearings in the reopened proceeding, the Commission's Hearing Examiner on May 17, 1960, issued his report containing the following findings based on the hearing record:[6]

> "1. The Atlanta Joint Terminal is an unincorporated agency created by the Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company jointly, as lessees of the Georgia Railroad; the Atlanta & West Point Railroad Company; and the Louisville and Nashville Railroad Company in its individual interest,

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[4] Exhibit 4 of "Brief of Railway Labor Executives' Association"; Jur. Statement, 2a.

[5] Exhibit 5 of "Exhibits to Brief of Railway Executives' Association".

[6] Exhibit 6 of "Exhibits of Railway Labor Executives' Association".

under terms of an agreement dated April 1, 1907, covering joint use and operation of terminal properties and facilities in Atlanta, Ga.

"2. Employees of Atlanta Joint Terminals are employees of the aforesaid railroad carriers and their lessee organizations, jointly, under the terms of the said agreement of April 1, 1907, and proportionately, in relation to the terminal service provided for each of the aforesaid railroads and the sums contributed by each railroad to pay the expenses of the agency, are employees of each railroad aforesaid, including the Louisville and Nashville Railroad Company.

"3. Report and order herein dated March 1, 1957, modified by incorporating therein by reference the facts, conclusions, and findings contained in the report and order on further hearing in respect of the status of Atlanta Joint Terminals and the employees thereof, and protection of employees affected as an incident to approval of the merger, etc., of The Nashville, Chattanooga & St. Louis Railway into the Louisville and Nashville Railroad Company, et al. Prior report 295 I.C.C. 457".

After briefs and arguments before the Commission, the agency on October 26, 1961, affirmed the Hearing Examiner's findings and the inclusion of the employees engaged in the AJT operation within the scope of the protective conditions. (Exhibit F to Amended Complaint). Subsequently, the Commission considered and denied the L&N petition for reconsideration of its order.

Thereafter, on January 24, 1963, the L&N filed an amended complaint in the District Court to include the Commission's order of October 26, 1961. The As-

sociation intervened in the action and filed an answer to the amended complaint. (R. 17-25). Following briefs and a hearing on the amended complaint, the District Court on August 5, 1965, entered its opinion affirming the Commission's order and dismissing the complaint. (R. 40-50; Jur. Statement, 1a-11a). The District Court's judgment effectuating its opinion was entered on August 9, 1965. (R. 51, 52).

On motion of L&N an amended opinion was entered by the District Court on August 31, 1965, (R. 53-55), and an amended judgment was issued on September 1, 1965. (R. 56).

ARGUMENT

1. The decision of the District Court affirming the Commission's order is plainly correct.[7] The Commission based its conclusion that the railroad employees engaged in the operation of the AJT were entitled to protection as a group pursuant to the provisions of Section 5(2)(f) of the Interstate Commerce Act on the ground that they were joint or common employees of the L&N and the subsidiaries of the L&N engaged in the operation of the AJT, an unincorporated terminal service agency. The Commission's conclusion that the employees involved were joint L&N employees was

[7] This Court has already affirmed the Commission's order of March 1, 1957, approving the merger in a suit involving, *inter alia*, the contentions of some railroad employees that they were not adequately protected. *City of Nashville et al* v. *United States et al*, 155 F. Supp. 98 (D.C. M.D. Tenn., Nashville Div., 1957), aff'd *City of Nashville et al* v. *United States et al*, 355 U.S. 63. The L&N appeared in this case in support of the order.

based on the following findings of fact: (Exhibit "F" to the Amended Complaint, Sheets 12 and 13)

> 1. Article 4 of the agreement of 1907 between L&N and its subsidiaries setting up AJT and providing for its operation designated the employees involved as "joint employees" and "common employees" of the parties;
>
> 2. In all litigation over the years involving AJT, the L&N acted as the plaintiff or defendant and described the employees as its employees;
>
> 3. L&N had issued its own employee system passes to the employees engaged in the AJT operation;
>
> 4. The employees engaged in the AJT operation are covered by the L&N group insurance plan and are described in the certificate issued thereunder as L&N employees.
>
> 5. The AJT is neither a corporation or an unincorporated association but simply a name used to describe a terminal service agency. It files no property tax returns or Federal or State income tax returns; it files no annual reports with the Commission; in litigation involving AJT the L&N has described the operation as that of L&N and its subsidiaries "operating yards and terminal facilities at Atlanta under the name and style of Atlanta Joint Terminals"; the AJT telephone number is that of the L&N in Atlanta.
>
> 6. The AJT is controlled and operated by L&N and its subsidiaries.

The L&N does not dispute any of these facts. Taken together they clearly support the Commission's conclusions that the AJT is simply a terminal service operation created and performed by the L&N and its

subsidiaries and that the employees involved are joint or common employees of L&N and those subsidiaries.

L&N argues, however, that since the AJT has been treated as a carrier for some purposes, the Commission erred in concluding that the employees involved are joint or common employees of L&N and its subsidiaries. The Commission in its report in the reopened proceeding stated that "While the factors relied upon by Louisville have been considered along with all the facts and circumstances embodied in the record before us, 'we do not regard them as controlling.'" (Exhibit "F" to Amended Complaint, Sheet 11).

The District Court, in affirming the Commission's orders found that "its findings of fact are supported by substantial evidence" and that it was not, therefore, "authorized to disturb the conclusions of this experienced agency of the Government charged with manifold duties in the field of transportation." (Jur. Statement, 11a).

Although the L&N attempts to clothe its appeal in the garment of substantial legal issues, the L&N in substance simply quarrels with the weight the Commission attached to the various factors before it and the judgment rendered thereon. The District Court was plainly correct when it found that the Commission's conclusions were supported by substantial evidence and that no occasion was presented for it to substitute its own judgment for the Commission's balancing of the factors before the agency. *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115 at page 126 (1962); *New York* v. *United States,* 331 U.S. 284, at page 326 (1947), reh. den., 331 U.S. 866.

Moreover, the Commission's treatment of the AJT employees is consistent with the decisions of Federal courts which have commonly treated employees of railroad service agencies organized and operated in substantially the same manner as AJT as joint employees of the organizing carriers. *McComb* v. *Southern Weighing and Inspection Bureau,* 170 F. 2d 526 (4th Cir., 1948); *Walling* v. *Western Weighing and Inspection Bureau,* 160 F. 2d 47 (7th Cir., 1946); *United States* v. *Pacific Electric Ry. Co.,* 157 F. 2d 902 (9th Cir., 1946), *cert. den.* 330 U.S. 849.

2. The Commission decision was based on the assumption that the agency was precluded from providing protection to the railroad employees engaged in the operation of the AJT pursuant to the provisions of Section 5(2)(f) of the Interstate Commerce Act unless they can be regarded as employees of a carrier which is an applicant or participant in the merger or other Section 5(2), transaction before the Commission. (Exhibit "F" to the Amended Complaint, Sheets 12 and 13). Subsequent to the Commission's decision in this case, the validity of such assumption was subjected to judicial review in a case in which the Commission denied protection to Chesapeake & Ohio Railway employees engaged in the operation of the Main Street Station in Richmond, Virginia, pursuant to an agreement with the Seaboard Air Line Railroad on the ground that the C&O was not a party to the Seaboard transaction before the Commission by which the employees were injured. The Commission's basis for denying protection was unanimously rejected by the reviewing court on the ground that Section 5(2)(f) provides for the protection of "the interests of the railroad employees affected" by the Section 5(2)(f)

transaction without regard to whether their employer is a carrier which is a party to the transaction. *Railway Labor Executives' Association* v. *United States,* 216 F. Supp. 101 (D.C.E.D. Va., 1963).

In its opinion the Court in that case spoke as follows on the application of Section 5(2)(f): (page 102-104)

> "Section 5(2)(f) commands protection of 'employees affected' by the 'transaction'. The 'transaction' here is the acquisition by Seaboard of the use of Broad Street station. The Act does not, as the Commission would say, limit its security to employees of a carrier involved in the transaction. The guardianship is not dependent upon the role of their employer in the transaction. All 'employees affected' are under the aegis of the Act. The only question is whether they are 'affected': Are they touched sufficiently by the transaction? As our recount of the facts will prove, that inquiry is fully satisfied presently by the immediacy of the relation to Seaboard of the complaining Chesapeake employees.
>
> * * * * * *
>
> "This recital of the facts plainly confirms the Commission's finding that the plaintiff Chesapeake employees at Main were actually affected by the Seaboard transaction. It shows, too, that practically they worked for the Seaboard as well as Chesapeake. Indeed, they were in reality, though not in contract, as much the employees of Seaboard as of Chesapeake. Their engagement and control by Chesapeake alone were arrangements merely for the railroads' convenience; it did not alter the truth that they were Seaboard's personnel as well.
>
> "With so immediate a relationship between them and Seaboard, and with the concession that

> Seaboard's transaction did cause them loss of employment, it is hypertechnical to say the individuals suing here were not 'employees affected' within the first provision of § 5(2)(f) supra. In these circumstances the statute is undeniable. No other prerequisite to the enjoyment of the security of the Act is exacted."

The clear language of the first sentence of Section 5(2)(f) upon which this decision rests is reinforced by reference to Section 222(f) of the Communications Act of 1934 (47 U.S.C.A., Section 222(f)), which provides for employee protection in the merger of telegraph carriers. The cited statutory provision specifically provides that in telegraph mergers protection shall be accorded only to an employee of "any carrier which is a party to a consolidation or merger". This statute was passed in 1934. When Congress subsequently enacted Section 5(2)(f) of the Interstate Commerce Act in 1940, it deliberately did not so limit protection of railroad employees in mergers or similar transactions. This Court cited the provisions of the Communications Act in determining the type of protection provided by Section 5(2)(f). *Brotherhood of Maintenance of Way Employes, et al.* v. *United States,* 366 U.S. 169, 175 (1961). In that case, the differences between the two statutes worked against the employees' contention that Section 5(2)(f) required job protection in contrast to financial compensation. Here, the differences between the two statutes clearly support the position that the protection accorded by Section 5(2)(f) is not limited to employees of applicants or carriers involved in a transaction.

This application of Section 5(2)(f) was advanced to the Commission by the Association in the present

case as an alternate basis for according protection to railroad employees engaged in the operation of the AJT and to the District Court as an alternate ground for affirming the Commission's action in according such protection.[8] The Richmond terminal case and the decision quoted above with respect thereto was cited by the District Court in its decision in the present case. (Jur. Statement, 8a, 9a). It constitutes a separate ground for this Court's affirmance of the District Court judgment not dependent upon a finding that the employees involved are joint employees of L&N and its subsidiaries.

3. The L&N on August 31, 1957, consummated the merger approved by the Commission without seeking reconsideration of the conditions imposed by the Commission's order of approval providing employee protection for those employees engaged in the operation of the AJT adversely affected by the merger. Indeed it successfully opposed reconsideration of such order by AEPA on the grounds that such employees were adequately protected by the order. This Court has held that the beneficiary of an agency order approving a merger who consummates and accepts the benefits of the merger is estopped from thereafter seeking to invalidate a condition of such approval. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, at page 502 (1955); *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507 (1953). Those decisions are but one of the many applications of the common sense principle that one who accepts the benefits of a transaction is estopped from thereafter

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[8] Exhibit 6 of "Exhibits to Brief of Railway Labor Executives' Association, page 54; R. 17-25.

asserting its invalidity. *American National Bank and Trust Co. of Chicago* v. *Taussig,* 255 F. 2d 765, 769 (7th Cir. 1958), *cert. den.,* 358 U.S. 883; *Burgess* v. *Nail et al.,* 103 F. 2d 37, 44 (10th Cir., 1939) and cases there cited.

The Association has maintained throughout that the L&N was estopped from asserting the invalidity of the Commission's action in protecting the employees here involved by accepting such condition through consummation of the merger. (Exhibit 6 of "Exhibit to Brief of Railway Labor Executives Association," pages 62, 63; R. 17-25) This bar to a judgment in favor of the L&N was not removed by the Commission's action in issuing its order of October 26, 1961, which reaffirmed the original condition in its order of March 1, 1957, approving the merger. A second judgment or order merely reaffirming a first cannot serve as a vehicle to obtain review of the first order. *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 20 (1952), *reh. den.,* 344 U.S. 910; *Department of Banking* v. *Pink,* 317 U.S. 268 (1943), *reh. den.,* 318 U.S. 802; *Skowhegan Savings Bank* v. *Securities and Exchange Commission,* 201 F. 2d 702, 705 (D.C. Cir., 1952).

This bar against the L&N action constitutes a third and separate basis for this Court to affirm the District Court's judgment.

CONCLUSION

The Association respectfully submits that upon the basis of the foregoing points and authorities the judgement and decree of the District Court should be affirmed.

Respectfully submitted,

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December, 1965

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 792

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

Atlanta Joint Terminals (AJT) is an unincorporated terminal service agency created in 1907 by appellant, the Louisville & Nashville Railroad Company (L&N), and two carriers controlled by L&N to be jointly used and operated by them in connection with

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their terminal operations in Atlanta, Georgia (J.S. App. 18a, 29a). On March 1, 1957, the Interstate Commerce Commission approved a merger between appellant and the Nashville, Chattanooga, and St. Louis Railway (NC&StL). 295 I.C.C. 457. Pursuant to § 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. 5(2)(f),[1] the Commission protected appellant's employees with the formula of protection that it had used in other cases. See, *e.g.*, *Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 171.

Appellant brought this action in a three-judge district court to enjoin and set aside the Commission's order insofar as it had imposed protective conditions with respect to employees of AJT. The district court suspended action on appellant's complaint (J.S. App. 3a) after the Commission reopened the proceeding on its own motion "to determine the nature and organizational character of [AJT], the relationship of it and its employees, if any, to the [L&N], and the extent to which, if any, our report and order herein of March 1, 1957, should be modified insofar as the protective conditions prescribed therein were made applicable to the employees of [AJT]" (J.S. App. 3a, 19a–20a).

---

[1] Section 5(2)(f) provides in pertinent part:

"As a condition of its approval [of a combination or consolidation of carriers] * * * the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment * * *."

After further hearings, the Commission issued a new order on October 26, 1961 (J.S. App. 19a–32a; 312 I.C.C. 676). It discussed in detail AJT's organization and operations and concluded from all the facts of record that "the employees of [AJT] must be regarded as being, in reality, joint or common employees of the [L&N] and its affiliated carriers, * * * with which it created and bears ultimate responsibility for the operation of the terminal" (J.S. App. 30a). It supported its conclusion with findings that AJT's operations were controlled jointly and directly by management representatives of L&N and its affiliates; that these carriers shared the costs of its operation on a pro rata basis; and that their power of control and management over AJT's organization and operations included ultimate control over AJT's employees (J.S. App. 29a–30a). Hence, even though AJT might be considered a carrier for some regulatory purposes under the Act, its employees, because of their relationship to appellant, were entitled to the benefit of the employee protective conditions imposed by the Commission on appellant (J.S. App. 30a–31a).

The district court sustained the Commission's order. It held that no error of law had been committed, that the Commission's action was not arbitrary, capricious or an abuse of discretion, and that the Commission's findings of fact were supported by substantial evidence (J.S. App. 11a; 244 F. Supp. 337 (W.D. Ky.)).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The decision below is clearly correct and should be affirmed.

Congress' plain intent in enacting § 5(2)(f) of the Interstate Commerce Act (note 1, *supra*) was to protect railroad employees against the grave employment dislocations that often accompany railroad mergers. The Commission's decision in the present case carries out this intent. Applying its expert knowledge and experience in the area of railroad employment (compare 45 U.S.C. 151 Fifth), the Commission found that AJT was so far the creature of L&N and the other carriers (L&N affiliates) which had created it that its employees should be deemed employees of L&N in order to effectuate the protective purposes of § 5(2)(f). As the record clearly shows (J.S. App. 29a–30a), AJT is an unincorporated terminal service agency created by L&N and its affiliated carriers to be used and operated in common by them. Its operations are controlled directly by management representatives of these carriers. The parent carriers share the costs of its operation on a pro rata basis. Fiscal and accounting activities of AJT, including the filing of reports with various federal and State tax and regulatory agencies, are performed by one of the parents. AJT has no bank account; payment of employees' wages and of claims for injuries is made by drawing against the bank accounts of one of the parents. In the agreement establishing AJT, its employees are termed joint or common employees. The parent carriers are parties in all litigation involving AJT.

In the circumstances, it would be manifestly unrealistic to absolve L&N of responsibility for the merger's impact on AJT's employees on the formalistic theory that, since AJT is recognized as a carrier and as an employer for some purposes, it must be recog-

nized, contrary to business and economic reality, as sole employer for all purposes. That, nevertheless, is the thrust of appellant's argument: the Commission, as a matter of law, cannot concede AJT's existence as a carrier or employer for any purpose under the Act yet find that AJT's employees are also employed by the L&N for purposes of the Act's employee-protection provisions.

This contention finds no support in the Act or in judicial interpretation thereof. The Commission's power to find a joint employment relationship between the employees of a railroad service agency and the group of carriers which created the agency—precisely the situation here—is recognized. *Railway Labor Executives' Association* v. *United States,* 216 F. Supp. 101 (E.D. Va.); cf. *McComb* v. *Southern Weighing & Inspection Bureau,* 170 F. 2d 526 (C.A. 4); *Walling* v. *Western Weighing & Inspection Bureau,* 160 F. 2d 47 (C.A. 7). While for some regulatory purposes it may be convenient to regard AJT as a carrier or employer in its own right, that should not be allowed to obscure the undeniable fact that ultimate control of the employment relationship lies with the parent carriers. (J.S. 30a.) The Commission, therefore, was entitled to find that L&N owes AJT's employees the duties of an employer under § 5(2)(f).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 792

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - Appellant,

versus

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
RAILWAY LABOR EXECUTIVES' ASSOCIATION, and
ATLANTA EMPLOYEES PROTECTIVE ASSOCIATION, - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 792

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - *Appellant,*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
RAILWAY LABOR EXECUTIVES' ASSOCIATION, and
ATLANTA EMPLOYEES PROTECTIVE ASSOCIATION, - - - - - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM.

STATEMENT.

The appellant opposes and herein briefly responds to the separate motions to affirm filed by the United States and the Interstate Commerce Commission (jointly called the Government) and by Railway Labor Executives' Association (RLEA).

The Government says (page 1) that the L&N and two carriers "controlled" by L&N created the AJT.

RLEA calls these two carriers "subsidiaries" of the L&N (page 7). The characterizations are incorrect, the two carriers referred to being affiliates of the L&N.

RLEA (page 2) erroneously speaks of the AJT employees as being "adversely affected by the merger." Both the Commission (J.S. App. 31a) and the Court below (J.S. App. 13a) carefully abstained from expressing any opinion about whether or not the AJT employees had been or would be adversely affected, there being no evidence on that question and it being reserved for later decision (J.S. App. 20a) if it is reached.

RESPONSE TO THE GOVERNMENT'S MOTION.

The Government argues (page 4) that because the L&N and two of its affiliated carriers control the AJT, AJT employees are L&N employees. There is no more logic to this contention than there would be to one that because the L&N owns a one-third interest in another corporation, the employees of the latter are automatically L&N employees. The "association veil" is no more to be pierced than is the "corporate veil," in view of the fact that Section 1(3)(a) places carriers which are associations (such as the AJT) on a parity with carriers which are corporations.

Contrary to the Government's assertion (page 4), the appellant relies on no "formalistic theory" in urging as it does that the AJT cannot, at one and the same time, both be a carrier and an employer and not be a carrier and an employer. This is not formalism; it is the plainest of good sense.

The Government urges (page 5) that "[w]hile for some regulatory purposes it may be convenient to regard AJT as a carrier or employer in its own right, that should not be allowed to obscure the undeniable fact that ultimate control of the employment relationship lies with the parent carriers." Status as a carrier or an employer is not determined by what is "convenient" but according to the rules of law. At issue in this case is action of the Commission under but one statute, Section 5(2)(f) of the Interstate Commerce Act. There is but one definition of a carrier applicable to that statute, and it is the one in Section 1(3)(a), which says that an association which does what a carrier does is to be considered a carrier. The fact that carriers A, B and C control carrier D is of itself not at all persuasive that D's employees are also the employees of A, B and C.

Chaos is the only word to describe the results of the ruling herein, which changes AJT employees from their fifty-year status of sole employees of Atlanta Joint Terminals into that of employees of four distinct common carriers—AJT, L&N, Georgia Railroad and A&WP. AJT employees may claim bargaining rights against each of the four, and similar claims may be made by the employees of every other terminal company throughout the nation. This Court should not permit such disruption of established employment relationships.

At page 5 the Government cites *Walling* v. *Western Weighing & Inspection Bureau*, 160 F. 2d 47 (CA-7, 1946), and *McComb* v. *Southern Weighing & Inspec-*

tion Bureau, 170 F. 2d 526 (CA-4, 1948), in each of which it was held that the inspection bureau there involved was not an entity in its own right but a mere department of the member railroads. Neither case followed the hybrid entity-aggregate theory erroneously followed in the case at bar. *Walling* was most explicit on the point that the bureau was *not* an entity but only the aggregate of its creators, the appellate court having affirmed the lower court in its conclusion thus stated (160 F. 2d 48): "I conclude that the employees, the subject of the complaint filed herein, are not employees of the defendant, but are joint employees of the various railroads comprising the defendant." In the present case, the Government's position is that the AJT is both an entity and an aggregate; and that although the AJT is an employer of its own employees, the L&N and the other two carriers which formed the AJT are also employers of those same workers. In so saying it ignores the fact shown of record (J.S. App. 25a, Tr. 77-78) that these employees treated L&N as a foreign road or carrier in demanding and receiving penalty wages when performing services on L&N tracks.

With regard to the case of *Railway Labor Executives Association* v. *United States,* 216 F. Supp. 101 (E.D. Va., 1963), also cited by the Government on page 5, the Main Street Station was not a separately operated common carrier, whereas the AJT *is* a separately operated common carrier and is conceded by the Government to be such.

RESPONSE TO RLEA'S MOTION.

RLEA says (page 8) that the appellant does not dispute certain facts which it lists. This is not true. For example, the appellant established that there has been an evolution away from the concept of the 1907 agreement,[1] which referred to the AJT employees as joint or common employees of the carriers which formed the AJT. RLEA and the labor unions it represents have been among the efficient causes of that evolution. Appellant showed, also, that how suit is brought by or against an association in Georgia is governed by the requirements of Georgia law, whereas how an association is treated under the Interstate Commerce Act is governed by Section 1(3)(a) of that Act.

In going back and arguing about these evidentiary matters, RLEA ignores the present posture of this case: The Government has conceded that the AJT is an entity, a carrier, and an employer in its own right; and what this appellant is complaining about is the simultaneous treatment of AJT as if it did not exist—as if it were just the L&N and the other two carriers which created and control it. Thus, the appellant's attack is not, as RLEA says (page 9), against the weight the Commission attached to the evidence; it is against the erroneous legal conclusion which the Commission reached.

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[1]The 1907 agreement was entered into long prior to the enactment of Section 1(3)(a) of the Interstate Commerce Act, which recognizes associations as entities.

RLEA is in error when it says (page 10) that the Commission's treatment of the AJT employees is consistent with the decisions of Federal courts in the *McComb* and *Walling* cases (noticed in the previous section hereof) and in *United States* v. *Pacific Electric Railway Co.*, 157 F. 2d 902 (CA-9, 1946). The *Pacific Electric* case simply followed the aggregate theory of associations, the Court specifically holding that Los Angeles Motor Coach Lines "was not a legal entity, but was merely a joint activity of appellee and Los Angeles Railway" (157 F. 2d 905). Here, the Government concedes, in pleading and brief, that the AJT is an entity, a carrier, an employer.

Neither RLEA nor the Government has cited a single authority in which an association has been treated, in the same case, as both a legal entity and the mere aggregate of its creators. It is the logical fallacy of that dual treatment which appellant complains of.

RLEA argues (pages 10-12) that even if the AJT employees are not employees of the L&N, Section 5(2)(f) authorizes or requires protection of railroad employees of carriers not participants in the merger transaction; and RLEA argues that the District Court's decision can be affirmed on that separate ground. There are at least two things wrong with that argument: The first is that under the rule of the *Chenery* cases (318 U. S. 80, 332 U. S. 194) the grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based. In this case the Commission made it abundantly clear that the only ground upon which it

acted was its conclusion that the AJT employees were L&N employees. It pointed out (J.S. App. 30a) that it has consistently interpreted Section 5(2)(f) as not requiring it to impose protective conditions for the benefit of employees of a carrier which is not an applicant or participant in the transaction before it for approval. The Commission cited (J.S. App. 30a) two of its decisions giving this same interpretation, one of which was handed down twenty years ago.[1]

A second reason why Section 5(2)(f) cannot be interpreted as protecting employees of a carrier not a participant in a merger transaction is that the accepted interpretation of the statute and its legislative history show that the first sentence of the section[2] was intended to afford protection such as is provided by the Washington Job Protection Agreement[3]; and that agreement applies only to employees of "carriers involved in a particular coordination".[4]

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[1]Cf. *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U. S. 169 (1961), at 179: ". . . we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years . . ."

[2]It is upon the first sentence that RLEA bases its argument (p. 12). The second sentence of Section 5(2)(f) simply provides for a minimum protective period (*Railway Labor Executives' Association* v. *United States*, 339 U. S. 142, 155 (1950)).

[3]"Those portions of the Committee's final report pertaining to employee protection urged codification of the Washington Agreement and a bill drafted along those lines, S. 2009, was passed by the Senate in 1939. 84 Cong. Rec. 6158. The Senate bill contained language identical to that now found in the first sentence of §5(2)-(f) . . ." *Maintenance of Way* case, *supra*, 366 U. S. at 173-174.

[4]Section 6(a). The Agreement is a part of the record herein (Ex. R-3, Sheets 53-71).

RLEA says (pages 10-11) that the District Court for Eastern Virginia held in *Railway Labor Executives' Association* v. *United States,* 216 F. Supp. 101, that Section 5(2)(f) provides protection for "railroad employees affected" by the transaction without regard to whether their employer is a carrier which is a party to the transaction. Not so. As the District Court for Eastern Virginia itself told RLEA in the later case of *Railway Labor Executives' Association* v. *United States,* 226 F. Supp. 521,[1] at 525, "Our ruling in that case cannot be so construed." The Court held in the second case that the Central of Georgia's withdrawal from the Frisco's Birmingham yard may have been an economic loss to Frisco "and some of Frisco's employees may have been affected as a result thereof, but the withdrawal does not sufficiently touch the transaction here under discussion to warrant 5(2)(f) protection" (page 525).

RLEA's next argument (pages 13-14), that the appellant is estopped from contesting the Commission's ruling as to the AJT employees, overlooks the fact that it was the Commission itself which reopened the proceeding and made the new order, as it was empowered to do by Section 5(9) of the Interstate Commerce Act. The attack made by the appellant is direct, not collateral—action which the appellant was clearly entitled to take. If RLEA had desired to attack the jurisdiction of the Commission to issue the reopening order and its subsequent order of October 26, 1961, it should have raised the question in a proper proceeding.

[1]Vacated on other grounds, 379 U. S. 199 (1964).

RLEA attempts to excuse its failure to attack the order of the Commission reopening the proceeding and the order made thereafter by arguing (page 14) that a second judgment or order "merely reaffirming a first" cannot serve as a vehicle to obtain review of the first order. The Commission's order of October 26, 1961, does not "merely affirm" its order of March 1, 1957. The 1957 order provided protection for AJT employees as employees of a carrier other than an applicant in the merger proceeding if they are adversely affected (295 ICC 457, at 501). The order of October 26, 1961, which appellant here attacks is on an entirely different basis: In it, the Commission protected the AJT employees solely on the basis that they are employees of the L&N, one of the merger applicants.

This Court has held that an administrative agency cannot be rendered powerless to perform its assigned functions by application of the judicial concept of estoppel (*Wallace Corp.* v. *N.L.R.B.*, 323 U. S. 248 (1944)).

CONCLUSION.

The motions to affirm should be denied and probable jurisdiction noted.

Respectfully submitted,

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